



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CRIMINAL REVISION NO. 13 OF 2019**

**REPUBLIC..... APPLICANT**

**VERSUS**

**EDDIE OCHIENG .....RESPONDENT**

**RULING**

1. The respondent was charged with the offence of preparation to commit a felony contrary to Section 308(1) of the Penal Code. The particulars of the charge were that on the 13th day of July, 2018 at Shonda area in Likoni Sub-County within Mombasa County was found armed with a knife in circumstances that indicated that he was so armed with the intent to commit a felony.

2. The case proceeded to hearing and the respondent was found guilty as charged. On 14<sup>th</sup> September, 2018, he was sentenced to serve 1 year imprisonment and 6 years under probation, due to his age. Hon. C.A. Ogweno, Resident Magistrate also made an order for the Probation Office, Mombasa to be informed of the said order.

3. The Officer-in-charge Shimo-la-Tewa Prison on 20th September, 2018 wrote to the Hon. Chief Magistrate, Mombasa Law Courts. He brought to the attention of the said Chief Magistrate the illegality of the sentence that had been imposed against the respondent as the maximum sentence under probation is 3 years. He therefore sought further clarification on the issue of the sentence.

4. On 6th December, 2018, Hon. J.M. Nang'ea, Chief Magistrate, Mombasa wrote to the duty Judge, Criminal Division seeking revision of the said sentence. The matter was brought to the attention of the duty Judge Mugure Thande on 27th December, 2018. She made orders for the production of the respondent in court and for the DPP to be served. On 28th December, 2018, the Judge noted that it was not possible for the respondent to be produced in court on the said date and made an order for his production in court on 8th January, 2019.

5. After the file went back to the High Court Criminal Registry, it was not listed for mention on 8th January, 2019 as ordered by the Court and everything went quiet until the 2<sup>nd</sup> April, 2019 when the letter from the Officer-in-charge Shimo-la-Tewa Prison was brought to my attention, in my chamber.

6. It is disconcerting to note that, the respondent's custodial sentence was running and the file pertaining to this matter was kept at the registry for 2 months unattended to. As at the time this matter was brought to this court's attention, only about one and half months of the respondent's custodial sentence was outstanding. The danger therefore existed of the respondent serving his custodial sentence and thereafter being released to serve sentence under probation for 6 years. If the foregoing had happened it would have been a travesty of justice.

7. The provisions of Section 5(1) of the Probation of Offenders Act provides as follows:-

***“ A probation order shall have the effect for such period of not less than six months and of not more than three years, from the date of the order as may be specified therein, and shall require the probationer to submit during that period to the supervision of a probation officer appointed for or assigned to the district or area in which the probationer will reside after the making of the order and shall contain such provisions as the court considers necessary for securing the supervision of the offender, and such additional conditions as to the residence and other matters as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition of the same offence or the commission of other offences.”***

8. Going by the above provisions, it is apparent that the trial court fell into error by sentencing the respondent to probation for a period of 6 years and by not assigning him a Probation Officer to supervise him from the area he will reside when serving probation.

9. However, the Hon. Magistrate correctly noted that the minimum sentence provided under the provisions of Section 308(1) of the Penal

Code is 7 years imprisonment. This court ordered for a social inquiry to be undertaken by the Probation Officer, Mombasa. The same was done. Mr. Migwi, the Probation Officer filed a sentence review report and recommended that the respondent be placed under community service.

10. The Hon. Magistrate's intention was for the respondent to serve part of his sentence under probation and not to put him under community service. Save for the illegality of the sentence meted out against the respondent, I see no other error of commission that would make me to interfere with the sentence.

11. In line with the provisions of Article 165(6) and (7) and Sections 362 and 364 of the Criminal Procedure Code, I hereby set aside the sentence imposed against the respondent and substitute it with 4 years imprisonment and after serving the said sentence, the respondent will be placed under probation for a period of 3 years. Once the respondent will be released from prison, he shall relocate to Seme District, East Katieno Location in Kombewa District where his father resides as none of the respondent's relatives in Likoni had expressed willingness to accommodate him for a prolonged duration of time. The respondent will be under the supervision of the Maseno Probation Office. He will be offered peer counseling and counseling on behavioral change so that he can be re-integrated into the society.

**DELIVERED, DATED and SIGNED at MOMBASA on this 30th day of April, 2019.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of**

Ms Marindah, Prosecution Counsel for the DPP - applicant

Respondent present in person

Mr. Oliver Musundi – Court Assistant